No. 181 MISC.

OCT 18 1950

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

Term, 1950.

JASPER JOHNSON,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND APPENDIX.

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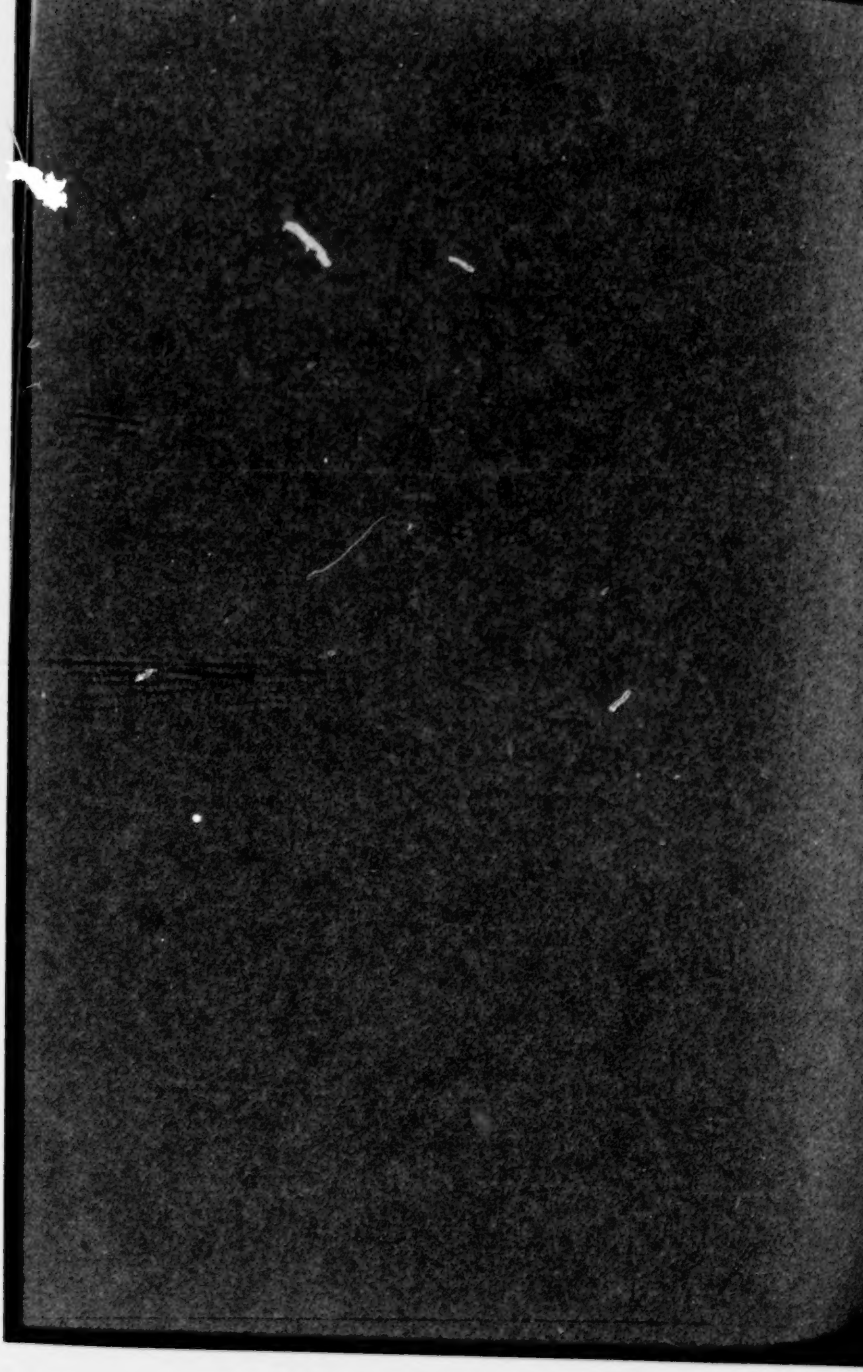

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Jasper Johnson 3a

(Recalled) 9a

Clarence Lofton 7a

(Recalled) 9a

Aaron Turner 8a

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COUNTER STATEMENT OF THE CASE.

About two days before Saturday, December 15, 1945, Aaron Turner, alias "Treetop," reconnoitered or observed the premises of the Ace Broom Factory, at 355-57 North 2nd Street, in the City and County of Philadelphia, and then conspired with Jasper Johnson, alias James Jacksdn, alias "Fats," alias "Playboy," this appellant, and one Clarence Lofton, to commit a robbery.

These three men went to the Ace Broom Company factory about five o'clock on Saturday afternoon, December 15, 1945, and Aaron Turner, alias "Treetop," was armed with a sashweight or pipe. Clarence Lofton stood outside and acted as the look-out. Aaron Turner entered the premises with or just ahead of Jasper Johnson, appellant. As they entered they met Frank Enders, and Aaron Turner struck him in the head with the sashweight or pipe, knocking him to the floor, causing injuries from which he died at the Hahnemann Hospital two days later, December 17, 1945. While he was lying on the floor of the front office of the Ace Broom Factory, Jasper Johnson, this appellant, went through his pockets and extracted therefrom about $175. The noise which had been occasioned by the killing of Enders caused Charles Simmons, the proprietor of the Ace Broom Factory, to run into the front room from the rear, and as he did so, Aaron Turner, alias "Treetop," hit him with the sashweight or pipe, knocking him to the floor, and causing injuries from which he died in the Hahnemann Hospital seven days later, December 22, 1945. While Charles Simmons was lying upon the floor, Aaron Turner, alias "Treetop," robbed him of an unknown sum estimated to be from one hundred to several hundreds of dollars. They thereupon ran out, joined the look-out, Clarence Lofton, and

proceeded to 8th and Callowhill Streets, to a taproom, where the three had several drinks and divided the money.

The lethal blows which were inflicted upon Charles Simmons and his robbery, as well as that of his employee, Frank Enders, occurred within a few moments of each other, and in the same surrounding circumstances, and they were both robbed.

All three men gave comprehensive and detailed statements of everything each one of them did in the commission of this robbery, wherein these two men were killed. The statements were all made in the presence of the others, and each one was signed by the others as witnesses. These murders had remained unsolved for almost six months, but as the result of police investigation, Clarence Lofton had been apprehended on May 24, 1946. Aaron Turner, alias "Treetop" was implicated and thereafter arrested on the morning of June 3, 1946. On the same day, in the afternoon, Jasper Johnson, this appellant, was apprehended by the police, and their written confessions were started on June 7, 1946, and signed on June 8, 1946.

During the taking of the statements or just after they had been written down stenographically, the defendants were brought before Magistrate Edward Williams in the Central Station for a hearing. They were all present when Lieutenant, now Captain James A. Kelly, Chief of the Homicide Division of the Philadelphia Police, testified concerning the commission of the crimes and told Magistrate Williams that they had made statements concerning their participation therein. D. Barlow Burke, Esq., Assistant District Attorney, was present on behalf of the Commonwealth, and he thereupon addressed the defendants as follows:

> "MR. BURKE: Do any of you men want to say anything this morning I want to warn you in advance

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that anything you say may be used against you in court, and that you don't have to say anything if you don't want to. I understand, however, that you have made statements to the officers and signed those statements. Jasper Johnson, you have made a signed statement to the officers?

"JASPER JOHNSON: Yes, sir."

Jasper Johnson, this appellant, thereupon was voluntarily sworn before the Magistrate, and gave a complete statement in answer to questions put to him concerning his participation in the crimes, generally about the same as is contained in his statement given to the police.

Next, Clarence Lofton, co-defendant, was voluntarily sworn, and he was told by Mr. Burke that anything he said may be used against him and that he did not have to speak unless he wanted to. He corroborated what Johnson had said. The stenographer at the magistrate's hearing, David F. Houlihan, Jr., testified at this appellant's trial concerning the proceedings before Magistrate Edward Williams and his testimony will be found at page 82 of the notes of testimony. After Johnson, this appellant, and Lofton had testified, Aaron Turner, alias "Treetop," was sworn, and having previously been warned, he said he did not want to add anything, but he corroborated the testimony of the two previous co-defendants, and what they said was true.

At his trial, Jasper Johnson, this appellant, denied that the statement he had given the police, or the fact that he had signed those of his co-defendants, was a voluntary act upon his part, and he said that because of police brutality, he was compelled not only to sign his statement and sign the other statements as a witness, but was likewise compelled to testify before the magistrate as he did.

This appellant, Jasper Johnson, alias James Jackson, alias

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"Fats," alias "Playboy," was tried before his Honor, Judge Edwin O. Lewis and a jury, on January 27, 1947, and was convicted of murder in the first degree, and given the death penalty by the jury. A motion for a new trial was argued before his Honor, Judge Lewis, the Trial Judge, and Judges Carroll and Bluett as a court en banc. On December 15, 1949, Judge Lewis filed an opinion overruling the motion for a new trial, and the matter is now before this Court on appeal, pro forma pauperis, the record of testimony in this appellant's trial not being printed.

Clarence Lofton, the third co-defendant, pleaded guilty before Judge Edwin O. Lewis, and his trial was held with Judges Vincent A. Carroll and Joseph Sloane sitting with Judge Lewis. After the taking of testimony, Lofton, the look-out, was adjudged guilty of murder in the first degree and sentenced to life imprisonment. Lofton's trial took place on February 21, 1947.

Aaron Turner, alias "Treetop," was first tried before his Honor, Judge Frank Smith and a jury, and was convicted on September 26, 1946, of murder in the first degree and the jury fixed the penalty at death. A motion for a new trial was refused in the lower courts and the matter was argued before the Supreme Court of Pennsylvania on November 24, 1947, and the conviction was affirmed by the Court, Mr. Justice Jones concurring, in an opinion by Mr. Chief Justice Maxey, dated March 23, 1948, found at 358 Pa. 350. Counsel for Turner thereupon filed a petition for a writ of certiorari in the Supreme Court of the United States, which was allowed before the Commonwealth of Pennsylvania was given an opportunity to file an answer thereto, and the matter was argued before the Supreme Court of the United States on November 17, 1948, Mr. Justice Murphy being absent. On June 27, 1949, in an opinion by Mr. Justice Frankfurter, in which Mr. Justice

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Murphy, Mr. Justice Rutledge, and Mr. Justice Black joined and Mr. Justice Douglas concurring in a separate opinion, a new trial was granted. Chief Justice Vinson, and Justices Reed, Jackson and Burton upheld the conviction, and Mr. Justice Jackson filed a vigorous dissenting opinion to the action of the majority of the Court. Following the decision of the Supreme Court of the United States in Turner, Petitioner, versus the Commonwealth of Pennsylvania, 338 U. S. 62 (1949), a retrial was had of Aaron Turner, alias "Treetop," on September 19th, 1949, before the Honorable Harry S. McDevitt, P. J., and a jury, and Turner was again convicted of murder in the first degree and the penalty fixed at death by the jury.

ARGUMENT.

There is no doubt of this appellant's guilt. Subsequent events have irresistibly shown that the only conclusion that can possibly be reached is that he, Turner and Lofton, did rob and murder Enders and Simmons at about the same time, and under the same circumstances, on Saturday, December 15, 1945, about five p. m., at 355-57 North 2nd Street, the premises of the Ace Broom Company, in Philadelphia, Pennsylvania.

A comparison of what Lofton, this appellant, Jasper Johnson, and Aaron Turner said in each others presence before Magistrate Williams (notes of testimony, p. 83), shows that there was no fabrication, that only one cognizant of the details of these brutal homicides could have told such a sordid story, and only one who had been an active partici-

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pant therein could have known what then transpired. The testimony before Magistrate Edward Williams on June 8, 1946, is also attached as Appendix A to this brief.

Before the magistrate, Johnson, this appellant, burst forth with an alacrity and with a spontaneous desire, not at all exhibited by Turner, but in a way that is so often present in the actions and statements of guilty persons. At no time was Appellant Johnson questioned by the authorities for more than an hour a day, a total altogether of approximately six hours. Johnson's attitude was such as to confirm the quotation of the late Chief Justice Maxey in his opinion in the first Turner case, cited in 358 Pa., 350 (1948) at p. 364, 58 A. 2d 61, where, using the famous words of Daniel Webster, speaking to the jury in the case of Commonwealth of Massachusetts versus John Francis Knapp, 9 Mass., 496, he said:

> "He had done the murder. No eye has seen him, no ear has heard him. The secret is his own, and it is safe! Ah! Gentlemen, that was a dreadful mistake. Such a secret can be safe nowhere—the guilty soul cannot keep its own secret. It is false to itself; or rather it feels an irresistible impulse of conscience to be true to itself. It labors under its guilty possession, and knows not what to do with it. The human heart was not made for the residence of such an inhabitant. It finds itself preyed on by a torment, which it dares not acknowledge to God or to man. A vulture is devouring it, and it can ask no sympathy or assistance, either from Heaven or from earth. The secret which the murderer possesses soon comes to possess him, and, like the evil spirits of which we read, it overcomes him, and leaves him whithersoever it will. He feels it beating at his heart, rising in his throat, and demanding disclosure. He thinks the

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whole world sees it in his face, reads it in his eyes, and hears its workings in the very silence of his thoughts. It has become his master. It betrays his discretion, it breaks down his courage, it conquers his prudence. When suspicions from without begin to embarrass him, and the net of circumstances to entangle him, the fatal secret struggles with still greater violence to burst forth. It must be confessed, it will be confessed, there is no refuge from confession but suicide, and suicide is confession."

Johnson, this appellant, was voluble, Johnson, this appellant, was anxious, he was willing, he desired more than anything on this earth, at that particular time, to tell what he had done, to unburden his soul of the details of these heinous crimes. Then, sitting in his cell, awaiting trial, he has had a change of heart. The instinct of self-preservation causes him to go to court, and there to commit perjury and to say that not only were his statements to the police and his signing of his co-defendants' statements extorted from him, but that he testified before the magistrate falsely because he was afraid. Does perjury mean anything to a murderer? Does perjury mean anything to a robber? Of course not.

Referring specifically to the questions raised by the appellant; first, admissibility of testimony and references to the murder of Charles Simmons, in a trial on an indictment charging the defendant with the murder of Frank Enders, it can be stated that these two men were killed with the same lethal weapon in the hands of Aaron Turner, alias "Treetop," at or about the same time under practically the same circumstances. In Commonwealth vs. Weeks, 10 D. & C., 568, the defendant was tried and convicted for the killing of a small boy named Eugene Williams, but at or

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about the same time the defendant had not only killed Mrs. Williams, but also another child by the name of James. The dead bodies had been found in a bed, partly burned, in an upstairs rear room. And all these facts were given to the jury. Not only is it part of the res gestae, to show just exactly what happened at the time of the homicide on trial but to prove what manner of man the defendant may be. Just at what point should the Commonwealth be required to stop? It is not denied that these two victims were found at or about the same time, their blood and their brains intermingling on the floor of the same store where they both were employed, both apparently struck in the head with the same blunt instrument and both robbed. In Commonwealth v. Logan, 361 Pa. 186, 192, 63 A. 2d 28 (1949), Mr. Justice Linn, referring to the case of Commonwealth v. Werntz, 161 Pa. 591, 29 A. 272 (1894), said:

> "* * * we adopted the definition of Wharton on Evidence, Section 259, that 'the res gestae are the circumstances which are the undesigned incidents of the litigated act, which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act: necessary in this sense, that they are part of the immediate preparations for, or emanations of such act, and are not produced by the calculated policy of the actors.'"

Of course, Mr. Justice Linn was referring to statements made by the victim, but the circumstances surrounding a particular homicide are always admissible. The Commonwealth contends there is no merit in this particular allegation of error.

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Argument

With reference to the appellant's second statement of questions involved, to wit, the admission in evidence of the confessions of the accused and his co-defendants, it is the Commonwealth's contention that there is nothing in the opinion of the Supreme Court of the United States, Turner, Petitioner v. The Commonwealth of Pennsylvania, 338 U. S. 62 (1949), which forbids the questioning of a suspected criminal by the police for a *reasonable* time. It must be borne in mind that this appellant, Jasper Johnson, was most voluble and spontaneous in his telling of what had transpired when Enders and Simmons were killed. He was not held five days before a preliminary hearing, but from the afternoon of May 3rd to the early morning of May 8th. He was questioned altogether about six hours. And he was not questioned continuously at great length, or abused. Nowhere does that appear in the testimony, except from the statements of the defendant himself, which the Commonwealth contends were perjury, and which the jury found were not true.

Judge Edwin O. Lewis, the Trial Judge in this appellant's case, at page 11 of his opinion overruling a motion for a new trial, filed December 15, 1949, said:

> "One would think that the success of the police methods in accomplishing a solution of the crimes involved in this case would of itself tend substantially to vindicate and to justify those methods, there being no credible evidence that the detention and investigation resulting in the solution involved any physical violence or beating whatever. Can anyone—even a Justice of the Supreme Court of the United States—suggest a more effective, or even an effective alternative method, for the resolving of the crimes that so often are never solved in our cities? There was detention, confinement,

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and a play upon the cupidity of all of the men concerned, but no brutality was established by any believable testimony or circumstance.

"Hence the case poses the question of whether the rights of society are superior to the rights of the individual. All individual rights are relative, not absolute; they must give way at times and under circumstances to the much more essential prerogatives of the many as a social group, as well as the State.

"Every individual constantly risks arrest as a suspect, and must submit to a reasonable detention while the process of investigation and vindication operates. Each of us, doubtless, resembles another, and may be mistaken for that other by a victim, especially in the darkness, and may be identified with reasonable conviction as a robber, a thief or a murderer. What is a reasonable amount of time to allow the police for investigation always depends upon the circumstances and the personalities involved."

And what has this Court, the Supreme Court of Pennsylvania, had to say upon the admissibility of confessions? In an opinion by Mr. Chief Justice Maxey, in the case of Commonwealth v. Agoston, 364 Pa. 464, 72 A. 2nd 575 (1950), unanimously affirmed and filed on April 10, 1950, after Chief Justice Maxey had passed away, in which case the Supreme Court of the United States has just refused certiorari on Oct. 9th, 1950, it was held, at page 476:

"At no time in the questioning of Agoston was there any breach of his constitutional rights. If the police had not interrogated him, they would have been derelict in their duty. Experienced and qualified police officers know, as do psychologists and theologians, that when a man possesses a guilty secret, he will, if given proper

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encouragement, disclose it. When a murder has been committed and the circumstances point to the one who is responsible for it, it is the duty of the police to encourage and not to discourage that person to tell the truth. As Chief Justice Paxon said in Commonwealth v. Clark, 130 Pa. 641, 18a. 988: 'The law is always tender and merciful to a defendant. It will protect him against the use of a confession drawn from him by holding out inducements to make it; but when a criminal wants to ease his mind by a voluntary confession, it would be a weak sentimentalism to interfere with his doing so.'

"Wigmore on Evidence, 3rd edition, pages 318-319, Section 851, observes: 'An innocent person is always helped by an early opportunity to tell his whole story; hundreds of suspected persons every day are set free because their story thus told bears the marks of truth. Moreover, and more important, every guilty person is almost always ready and desirous to confess, as soon as he is detected and arrested. This psychological truth, well-known to all criminal Trial Judges, seems to be ignored by some Supreme Courts. The nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes, the pressure is relieved; and the deep sense of relief makes confession a satisfaction. At that moment he will tell all, and tell it truly. To forbid soliciting him, to seek to prevent this relief, is to fly in the face of human nature. It is natural, and should be lawful, to take his confession at that moment—the best one.'

"For a police officer to say things to a suspect which would interfere with the natural desire of a criminal, a short time after committing his crime, to 'unbosom him-

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self,' is not consistent with common sense and would be prejudicial to the efficient administration of justice and would weaken the already inadequate protection which society has against criminals.

"In Commonwealth v. Dillon, 4 Dallas 116, Mr. Justice McKean, speaking for this Court, said: 'If such declarations are voluntarily made, all the world will agree that they furnish the strongest evidence of imputed guilt. The true point for consideration, therefore, is whether the prisoner has falsely declared himself guilty of a capital offense.'

"In Wilson v. State, 19 Ga. App. 759, 92 S. E. 309, Justice (now Senator) George, said: 'Practically all the authorities agree that the only proper question is whether the inducement held out to the prisoner tended to make his confession an untrue one. The object of every legal investigation is to ascertain the truth. The underlying principle is that the only confession that can be excluded is the false confession.'

"Brutal methods of obtaining confessions are interdicted for two reasons. (1) Inhuman treatment of prisoners is outlawed in all civilized countries. (2) A confession obtained by methods which would induce a prisoner to confess to a crime which he did not commit in order to be relieved of treatment which has become intolerable, is worthless both in logic and in law. On the other hand, when a prisoner has not been abused in any way, his admission of guilt, in reply to the interrogations of well-trained officers, should be accepted as evidence. If a man confesses to a crime *which he did not commit*, his confession, as soon as it is checked (as all confessions are), will always be found to be worthless because a lie never fits a fact. A mere naked confession, without corroboration, and which is later re-

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pudiated, is of such little probative value that it usually falls short of proving guilt beyond a reasonable doubt."

And what did Mr. Justice Jackson of the United States Supreme Court say in his vigorous dissenting opinion to the decision in Turner, Petitioner, vs. Commonwealth of Pennsylvania, 338 U. S., 62, 69 Sup. Ct. Rep. 1352 (1949).

"The seriousness of the Court's judgment is that no one suggests that any course held promise of solution of these murders other than to take the suspect into custody for questioning. The alternative was to close the books on the crime and forget it, with the suspect at large. This is a grave choice for a society in which two-thirds of the murders already are closed out as unsolvable.

"A concurring opinion, however, goes to the very limit and seems to declare for outlawing any confession, however freely given, if obtained during a period of custody between arrest and arraignment * * * which, in practice, means all of them.

"Others would strike down these confessions because of conditions which they say make them 'involuntary'. In this, on only a printed record, they pit their judgment against that of the Trial Judge and the jury. Both, with the great advantage of hearing and seeing the confessor and also the officers whose conduct and bearing toward him is in question, have found that the confessions were voluntary. In addition, the majority overrule in each case one or more State Appellate Courts, which have the same limited opportunity to know the truth that we do. * * *

"Of course, no confession that has been obtained by any form of physical violence to the person is reliable

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and hence no conviction should rest upon one obtained in that manner. Such treatment not only breaks the will to conceal or lie, but may even break the will to stand by the truth. Nor is it questioned that the same result can sometimes be achieved by threats, promises or inducements, which torture the mind but put no scar on the body. If the opinion of Mr. Justice Frankfurter in the Watts case was based solely on the State's admissions as to the treatment of Watts, I should not disagree. But if ultimate quest in a criminal case is the truth, and if the circumstances indicate no violence or threats of it, should society be deprived of the suspect's help in solving a crime merely because he was confined and questioned when uncounselled?

"We must not overlook that in these, as in some previous cases, once a confession is obtained, it supplies ways of verifying its trustworthiness. In these cases before us, the verification is sufficient to leave me in no doubt that the admissions of guilt were genuine and truthful. Such corroboration consists in one case of finding a weapon where the accused has said he hid it, and in others that conditions which could only have been known to one who was implicated correspond with his story. It is possible, but it is rare, that a confession, if repudiated on the trial, standing alone will convict unless there is external proof of its verity.

"In all such cases, along with other conditions criticised, the continuity and duration of the questioning is invoked and it is called an 'inquiry', 'inquest' or 'inquisition', depending mainly on the emotional state of the writer. But as in some of the cases here, if interrogation is permissible at all, there are sound reasons for prolonging it * * * which the opinions here ignore. The suspect at first perhaps makes an effort to excul-

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pate himself by alibis or other statements. These are verified, found false, and he is then confronted with his falsehood. Sometimes, as here, more than one crime is involved. The duration of an interrogation may well depend on the temperament, shrewdness and cunning of the accused and the competence of the examiner. But assuming a right to examine at all, the right must include what is made reasonably necessary by the facts of the particular case.

"If the right of interrogation be admitted, then it seems to me that we must leave it to Trial Judges and juries and State Appellate Courts to decide individual cases, unless they show some want of proper standards of decision. I find nothing to indicate that any of the courts below in these cases did not have a correct understanding of the Fourteenth Amendment, unless this Court thinks it means absolute prohibition of interrogation while in custody before arraignment.

"I suppose no one would doubt that our Constitution and Bill of Rights, grounded in revolt against the arbitrary measures of George III and in the philosophy of the French Revolution, represent the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself. They were so intended and should be so interpreted. It cannot be denied that, even if construed as these provisions traditionally have been, they contain an aggregate of restrictions which seriously limit the power of society to solve such crimes as confront us in these cases. Those restrictions we should not for that reason cast aside, but that is good reason for indulging in no unnecessary expansion of them.

"I doubt very much if they require us to hold that the

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State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as 'due process of law' And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions."

Then again referring to Chief Justice Maxey's opinion in the case of Commonwealth v. Agoston, supra, he had this to say at page 479:

"Eliminating those abnormal individuals who confess to crimes in order to obtain publicity, which confessions are quickly discredited by checking their details, it is difficult and perhaps impossible, to find in the annals of American court trials a single instance where a mentally and physically adult person of normal health and intelligence, who was well-treated as to food, lodging, water, air and rest, ever confessed under the mere 'pressure' of interrogation, to a crime which he did not commit. Those who have had experience as lawyers or judges in the trial of either civil or criminal cases have seen witnesses undergo direct and cross-examination for several successive days without any physical or mental breakdown.

"Appellant also complains because he was not given a preliminary hearing until the fourth day after his arrest. Such a delay in granting a defendant a preliminary hearing cannot properly be adjudged a denial of due process. If the delay is due to the fact that the time between the arrest and the hearing is spent in at-

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tempting by improper means to force a confession from a prisoner, the wrong done the prisoner is not the delay in giving him a hearing, but the methods used to secure a confession. A confession may be secured after a hearing as well as before a hearing. If the means employed are proper, a confession is testimonially worthy; if the means employed are improper a confession is testimonially worthless. A confession may be secured from a prisoner by unlawful methods one hour after his arrest and he may be given a hearing one hour after that, but the promptness of the hearing would not make his confession admissible. On the other hand a defendant may not be given a hearing for ten days after his arrest, yet during that period he might voluntarily confess his guilt without any questions whatsoever. The delay in giving him a hearing would not make his confession inadmissible."

There is no statute in Pennsylvania that designates a preliminary hearing as a part of "due process of law." Many times hearings are waived by defendants. Many times they do not care to testify. The only statute upon this subject is that of the Act of April 20, 1869, P. L. 1137, section 1, 53 Purdon's Digest, section 6858, which reads as follows:

"In all cases of arrest made by any police officer or constable of the city of Philadelphia upon any of the streets or highways of any of the cities of this commonwealth, it shall be the duty of the police officer or constable making such arrest to take the person arrested for a hearing to the office of the alderman or magistrate nearest to the place where said arrest has been made, except when the person shall be arrested for intoxication, in which case the intoxicated person shall be taken

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to the station-house for a hearing before the committing magistrate of the district."

Act of April 20, 1869, P. L. 1187, §2, 53 Purdon's, §6859.

"Any police officer or constable who shall violate the provisions of this act, upon conviction thereof, shall be punished by a fine of not less than fifty dollars and dismissed from office."

However, there is a Federal Rule of Criminal Procedure, No. 5(a) which requires an officer or person making an arrest to take the arrested person without unnecessary delay before the nearest available United States Commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States.

There is no corresponding statute extant in Pennsylvania nor does the Supreme Court of the United States have any procedural jurisdiction over the Courts of the Sovereign States. McNabb v. United States, 318 U. S. 332, 63 Sup. Ct. Rep. 608 (1943).

As was said in the case of Com. ex rel. Shaw v. Smith, 147 Pennsylvania Superior Court, 423, 24 A. 2nd 724 (1942), at page 433, by President Judge Keller:

"The Fourteenth Amendment to the Federal Constitution, the 'due process of law' clause of which—equivalent to the clause in our Constitution: 'Unless by the judgment of his peers or the law of the land,'—has been extended far beyond its original signification, does not require *that the 'process of law' in order to be 'due,' must be the same in all the states, or the same as prescribed for the Federal courts.* The State is free to regulate the procedure of its courts in accordance with its

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own conceptions of policy, unless in so doing it '*offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental*' (Italics ours): Brown v. Mississippi, 297 U. S. 278, 285; Snyder v. Massachusetts, 291 U. S. 97, 105; Hurtado v. California, supra; Missouri v. Lewis, 101 U. S. 22, 31; Lisenba v. California, 314 U. S. 219, 62 Sup. Ct. 280, 290; Mooney v. Holohan, Warden, 294 U. S. 103, 113. 'Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar': Snyder v. Massachusetts, supra. A judicial practice that has been non existent for 165 years cannot be said to be so 'rooted in the traditions and conscience of our people as to be ranked as fundamental.'"

This case of COM. ex rel. SHAW v. SMITH, supra, was cited with approval in the case of COM. ex rel. UVEGES, Appellant v. ASHE, 161 Pa. Sup. 58, 53 A. 2nd 894 (1947), wherein Judge Rhodes at page 62 said:

"(4) The Sixth Amendment to the Federal Constitution g ing to an accused in all criminal prosecutions the right to have the assistance of counsel for his defense applies only to trials in the Federal courts. Betts v. Brady, 316 U. S. 455, 461, 62 S. Ct. 1252, 86 L. Ed. 1595, 1601; Com. ex rel. McGlinn v. Smith, supra, 344 Pa. 41, 45, 24 A. 2d 1, 3.

"(5) The Fourteenth Amendment to the Federal Constitution relating to due process does not impose upon the states any uniform policy concerning representation by counsel in criminal cases; and it cannot be said that the amendment embodies an inexorable

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> command that no trial for any offense, or in any court, would be fairly conducted and justice accorded a defendant who is not represented by counsel. Betts v. Brady, supra, 316 U. S. 455, 473, 62 S. Ct. 1252, 86 L. Ed. 1595, 1607; Com. ex rel. McGlinn v. Smith, supra, 344 Pa. 41, 49, 58, 24 A. 2d 1; Com. ex rel. Shaw v. Smith, supra, 147 Pa. Superior Ct. 423, 433, 24 A. 2d 724; Mayo v. Wade, 5 Cir., 158 F. 2d 614. See also, Foster, et al. v. Illinois, 332 U. S. 134, 67 S. Ct. 1716, 91 L. Ed. 1542; Gayes v. New York, 332 U. S. 145, 67 S. Ct. 1711, 91 L. Ed. 1549."

Therefore, the States are not uniformly bound to have like procedure in criminal cases, nor are they held to the same rules concerning the admission of evidence by which criminal trials are conducted in the Federal Courts.

The Supreme Court of the United States decided in STRAUDDER v. WEST VIRGINIA, 100 U. S. 303, as follows:

> To give the Supreme Court of the United States jurisdiction there must be a denial or inability resulting from the Constitution or laws of a State. The sufficiency of the evidence in a criminal case is not a Federal question.

In WALKER v. SAUVINET, 92 U. S. 90:

> A party is not deprived of his liberty without due process of law if the trial is had according to the settled course of judicial proceedings.

In the case of FRANK v. MANGUM, 237 U. S. 309, 326, 35 S. Ct. 582, 59 L. Ed. 969, it was held:

> It is perfectly well settled that a criminal prosecu-

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> tion in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense.

And this case went on further to hold:

> Where an appeal is given in criminal prosecution, in determining whether defendant has been convicted without due process of law, proceedings in the Appellate Court as well as proceedings in the trial court must be considered.

And the Supreme Court of the United States has gone on further to conclude:

> "No particular form of procedure is required." (GARLAND v. WASHINGTON, 232 U. S. 642, 34 Sup. Ct. Rep. 456 (1913).) "And where the conditions just enumerated are fulfilled there is no violation of the guaranty of due process of law." (PICO v. U. S., 228 U. S. 225, 33 Sup. Ct. Rep. 482 (1913).)

In KRUG, 79 Fed. 308, it was said:

> The law by which the question of due process is determined is the law of the jurisdiction where the offense was committed and the trial is had.

Indeed, in MAXWELL v. DOW, 176 U. S. 581, 20 Sup. Ct. Rep. 448 (1900), it was held:

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> Within constitutional limits, the State and Federal Governments have full control over criminal procedure within their respective jurisdictions * * * When the complaint is merely that a State court has erroneously decided the facts of the case, all the proceedings before it being regular and sufficient, no claim of a denial of due process can be set up. (FRANKLIN v. SOUTH CAROLINA, 218 U. S. 161.)

Counsel for the appellee has purposely divided the second statement of questions involved given by the appellant, and desires to make particular reference to the alleged error that defendant did not have counsel at the time of the magistrate's hearing.

"The Act of May 31, 1718, 1 Sm. L. 105, Section 4, 19 P. S. 783, requires the courts to assign 'learned counsel' to prisoners upon all trials of capital cases. This is also required by the Act of March 22, 1907, P. L. 31, Section 1, 19 P. S. 784, which also provides for compensation and expenses for such assigned counsel. This has never been interpreted to mean that counsel must be provided for persons accused of capital crimes as soon as those persons are taken into custody. See Commonwealth ex rel. McGlinn v. Smith, 334 Pa. 41, 24 A., 2d 1." The above was a quotation from a foot-note on page 356 of the case of Commonwealth v. Turner, supra.

Mr. Chief Justice Maxey had much to say about that in the case of Commonwealth v. Agoston, supra, at page 480, as follows:

> "If due process requires the state to provide a defendant with counsel while he is being interrogated by police officers, the state should logically be required to provide a suspect with counsel from the very moment

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of his arrest.[2] The only function counsel could have at the time of a suspect's interrogation would be to instruct him to 'keep his mouth shut.' It is well known that the 'secret which the murderer possesses soon commences to possess him' and that his guilty conscience exerts a tremendous pressure on his vocal faculties. This is especially true when shortly after the crime's commission there is a let down in the criminal's nervous energy and remorse is temporarily in the ascendant. If a criminal, desiring to release his troublesome secret, is to be frustrated by the action of the state in providing him at that time with an advocate who will counsel silence, the number of unsolved American murders will be greatly augmented, for he who plans a murderous assault does not plan to have it witnessed by anyone except the victim, and his lips, the felon quickly and permanently seals. If 'due process' requires that counsel be present when a suspect in a murder case is being interrogated, there is no logical reason why it should not require that counsel be present when a suspect in a burglary or robbery is being interrogated.

"Since the record shows that Agoston was questioned by state and local police officers in a proper manner, that no physically or psychologically coercive methods were used by the officers to obtain a confession from

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[2] Agoston was asked if he wanted counsel and he answered "No." The right guaranteed a defendant by Section 9 of the Pennsylvania Bill of Rights, "to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face," etc., does not mean that he must be provided with counsel as soon as he is taken into custody. The Act of May 31, 1718, 1 Sm. L. 105, Par. 4, 19 P. S. 783, provides that "learned counsel" be "assigned to the prisoners" upon all trials of "capital crimes." The Act of March 22, 1907, P. L. 31, Par. 1, provides for the appointment by the court of not more than two persons to act as counsel for a defendant when he is under indictment for murder and files an affidavit that he is destitute of means to employ counsel.

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him, the complaint of denial of due process of law in this case is without merit.

"In Lyons v. Oklahoma, 322 U. S. 596, the defendant was indicted for murder. No counsel was supplied him until after his preliminary examination, which was subsequent to the confessions he had made. Lyons complained that the police officers physically abused and threatened him. This was denied by the officers. The interrogations, before Lyons confessed, continued until two-thirty in the morning. The Supreme Court held in an opinion by Mr. Justice Reed that, 'The mere questioning of a suspect while in the custody of police officers is not prohibited either as a matter of common law or due process (Citing cases)'. It was held that the defendant had not been denied due process of law and that: 'The Fourteenth Amendment is a protection against criminal trials in state courts conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice, and in a way that necessarily prevents a fair trial.' Lizenba v. California, 314 U. S. 219, 236."

And what does Mr. Justice Jackson have to say in his dissenting opinion previously referred to, in Turner, Petitioner, v. Commonwealth of Pennsylvania, supra?

"Amid much that is irrelevant or trivial, one serious situation seems to me to stand out in these cases. The suspect neither had nor was advised of his right to get counsel. This presents a real dilemma in a free society. To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime because under our ad-

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versary system, he deems that his sole duty is to protect his client; guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.

"If the state may arrest on suspicion and interrogate without counsel, there is no denying the fact that it largely negates the benefits of the constitutional guaranty of the right to assistance of counsel. Any lawyer who has ever been called into a case after his client had 'told all' and turned any evidence he has over to the government, knows how helpless he is to protect his client against the facts thus disclosed.

"I suppose the view one takes will turn on what one thinks should be the right of an accused person against the state. Is it his right to have the judgment on the facts? Or is it his right to have a judgment based on only such evidence as he cannot conceal from the authorities, who cannot compel him to testify in court and also cannot question him before? Our system comes close to the latter by any interpretation, for the defendant is shielded by such safeguards as no system of law except the Anglo-American concedes to him."

Mr. Chief Justice Maxey in Commonwealth v. Agoston, supra, at page 483 concerning the admissibility of confessions, says:

"In judging the admissibility of confessions, these facts and principles must be taken as established: (1) The fact that the confessor is in custody and has no counsel does not invalidate the confession made by him.

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(2) The fact that the interrogation of a suspect continues until he confesses is not per se a ground for invalidating his confession, nor is the fact that the interrogation lasted for a considerable period of time any ground for invalidating the confession, unless the interrogation was so long in duration as to amount to mental or physical coercion and duress."

And in conclusion Mr. Chief Justice Maxey quoted the words of Justice Cardoza of the Supreme Court of the United States in Snyder v. Massachusetts, 291 U. S. 97, with regard to due process of law, as follows:

"The test is whether or not the thing complained of is 'so flagrantly unjust that the Constitution of the United States steps in to forbid it.' Justice Cardoza said: 'Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. The due process clause does not impose upon the states the duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall.' Ownbey v. Morgan, 256 U. S. 94—The concept of fairness must not be strained until it is narrowed to a filament. We are to keep the balance true."

And then the Chief Justice, quoting from Wigmore on Evidence in a footnote at page 487 of Commonwealth v. Agoston, supra, uses the words of an eminent English Judge, Justice Erle, who said in R. vs. Baldry, 2 Den Cr. C. 445:

"According to my judgment, in many cases where confessions have been excluded, justice and common

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sense have been sacrificed, not at the shrine of mercy, but at the shrine of guilt. In 12 Cox Cr. 180, C. B. Kelly said: 'The cases excluding confessions on the ground of unlawful inducement have gone too far for the protection of guilt.' Justice Hayes in 15 Ir. C. L. 85, held that the exclusion of lawfully obtained confessions was 'an exhibition of morbid sensibility towards criminals.'"

With reference to appellant's third question involving the admissibility of testimony of the accused before a magistrate at a preliminary hearing, the Commonwealth has this to say:

At or about the time the confessions were signed by the two defendants, a hearing was had before Magistrate Edward Williams in the Central Station, City Hall, Philadelphia, Pa. D. Barlow Burke, Esquire, was present for the Commonwealth. Jasper Johnson, this appellant, was most voluble and ready to testify. He was duly warned by the Assistant District Attorney, as appears in the notes of that hearing, and thereafter he testified fully.

In the case of Commonwealth v. Clark, 130 Pa. 641, 18 A. 988 (1889), Mr. Chief Justice Paxson said at page 650:

> "The law is always tender and merciful to a defendant. It will protect him against the use of a confession drawn from him by holding out inducements to make it; but, when a criminal wants to ease his mind by a voluntary confession, it would be a weak sentimentalism to interfere with his doing so. Nor do I see that its force as a statement is impaired by the fact that the Justice of the Peace administered an oath to him."

And Mr. Justice Paxson continued further at page 651:

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> "The fact must not be overlooked that a defendant in a homicide case may now take the stand and be sworn as a witness in his own behalf. There would seem to be no good reason why he may not, of his own motion, go before a magistrate, and make a voluntary statement under oath. It is quite a different matter where the oath is administered against his will."

In the case of Commonwealth v. Spardute, 278 Pa. 37, 122 A. 161 (1923), at page 47 thereof, Mr. Justice Schaffer said:

> "It did not invalidate his confession that he was sworn.
>
> "The mere fact that the defendant was under arrest or was in the charge of armed police officers when he made his confession, will not make a confession involuntary."

In Underhill On Criminal Evidence, 2d. ed., Section 132, page 256, the following is said upon the fact that an accused person may be sworn before a magistrate:

> "The preliminary examination of an accused person has for its main objects the perpetuation of the testimony against him, the ascertainment if he shall be held to await the action of the Grand Jury, and if so, whether he shall be admitted to bail. When the accused is brought before the justice, the latter must, as soon as possible, examine the witnesses for and against him under oath. The accused must be present when this evidence is received, though the Examining Magistrate may exclude all witnesses except the one who is testifying. *The accused may be sworn at his own request, and examined as a witness in his own behalf,*

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under the restrictions which apply to the examination of defendants in criminal trials. (Italics ours.) He should, in justice to himself, be informed of his right to refrain from testifying. He should be told that he need not answer any questions, and that his silence or expressed refusal to answer incriminating questions cannot be used against him on his trial. After thus having been warned, anything he may say in the nature of a confession and which is not under oath, may be used against him on his trial. *And where having been instructed as to his right to remain silent at the preliminary examination, if he so desires, he voluntarily goes on the witness stand and, under oath, testifies to his version of the facts in the case, anything he may say of an incriminating nature under such circumstances, though he is under oath, may be used against him subsequently as his confession.*" (Italics ours.)

As previously argued, there was no duty upon the Commonwealth to supply the defendant with the benefit of assistance of counsel at the magistrate's hearing.

Mr. Justice Horace Stern, in affirming the Judgment in the Supreme Court of Pennsylvania, Commonwealth vs. Johnson, 365 Pa. page 303, 374 A. 2nd 144 said:

"OPINION OF THE COURT.

(Filed June 26, 1950.)

HORACE STERN, J.

Jasper Johnson, having been convicted by a jury of murder in the first degree with the imposition of the death penalty, appeals from the dismissal by the trial court of his motions for a new trial and in arrest of judgment.

According to the Commonwealth, Aaron Turner,

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Johnson, and Clarence Lofton conspired to perpetrate a robbery at the Ace Broom Company factory in Philadelphia on December 15, 1945. Lofton stood outside and acted as the lookout. Turner and Johnson entered the premises, where they were met by Frank Endres, an employe of the factory. Turner hit him on the head with a piece of pipe or a sash-weight, knocking him down and causing injuries from which he died two days later. While he was lying on the floor Johnson went through his pockets and extracted a wallet containing about $175; he then threw the wallet into a coal pile underneath the elevator. The noise occasioned by the assault on Endres brought Charles Simmons, the proprietor of the factory, running into the room; Turner struck him with the same weapon, knocking him to the floor and causing injuries from which he died seven days later. While he was lying on the floor Turner robbed him of his money, the amount of which is not disclosed in the testimony. Turner and Johnson ran out, joined Lofton, and the three of them proceeded to a taproom where they had several drinks and divided the spoils. Johnson was apprehended on June 3, 1946; the two others had been arrested previously, Turner earlier on the same day. Johnson was placed in a cellroom in City Hall and confined there until June 8, a period of five days, when he was taken before a magistrate and testified; he was held for the action of the grand jury and committed without bail. At his trial, which took place in 1947, he denied that he had participated in any way in the robbery and murders.

Johnson's first complaint on this appeal is in regard to references made during the trial, both by the district attorney and the trial judge, to the murder of Charles Simmons; also that the coroner's physician was allowed

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to testify concerning his autopsy on the body of Simmons and his finding that injuries to the head had caused Simmons' death. It can scarcely be seriously argued that mention of Simmons and the manner of his death should, or could, have been eliminated from the trial since the assaults on Endres and Simmons were made at the same time, with the same weapon, and in the course of the same criminal undertaking. No coherent narrative of the event could have excluded the facts as to the entrance into the room of Simmons and the attack upon him immediately after the assault upon Endres, the robbery from both their bodies, and the flight of the three conspirators from the scene. It all occurred at the same place and time.

During the course of the four or five days of Johnson's incarceration prior to the magistrate's hearing he was questioned from time to time by detectives, either singly or in groups; this was admitted by the Commonwealth and testified to by the detectives themselves. On the night of June 7 he signed a written confession admitting his participation in the crime and reciting in detail the facts in regard thereto; it is suggested by the district attorney that his cooperation with the Commonwealth came after finding out that he had been cheated by Turner in the division of the stolen money. During this period of detention he was not represented by a lawyer, but he made no request for one except to inquire whether there would be counsel to represent him when his case came up for trial in court, and he was assured that he would then be represented by an attorney appointed by the court. Except that he wanted to see his "girl friend" he did not ask to be allowed to communicate with any of his friends or relatives; on the contrary, he said that he

did not want to see any of them. He claims to have been beaten at various times in connection with the interrogations, but this was strenuously denied by the detectives and no marks or bruises on his body were ever observed by anyone; he did not make any complaint to the magistrate or to the prison authorities that he had suffered any such beatings, nor did he seek the services of the jail physician; his assertion, therefore, that he was beaten is, to say the least, of dubious veracity and was obviously rejected by the jury. The learned trial judge instructed the jury that, if force or duress of any kind had been exerted upon him to compel him to make a statement, a confession so obtained could not be used in evidence against him and that the jury should discard it entirely in their consideration of the case; it was only if made voluntarily that it could be regarded as trustworthy, in which event they could give it such force and effect as they thought it entitled to under the circumstances. This submission to the jury of the question whether the inculpatory statement was coerced or was voluntary was in accord with long established Pennsylvania law: *Commonwealth v. Spardute*, 278 Pa. 37, 48, 122 A. 161, 165; *Commonwealth v. Jones*, 341 Pa. 541, 548, 549, 19 A. 2d 389, 393; *Commonwealth v. Simmons*, 361 Pa. 391, 400, 401, 65 A. 2d 353, 358. Of course it is recognized that the jury's decision on that issue is not conclusive, but is subject to judicial review in order to ascertain whether the methods employed by the police authorities to obtain the confession constituted a violation of the due process clause of the fourteenth amendment of the constitution.

Johnson's principal contention on this appeal is that his signed confession should not have been admitted

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in evidence because, apart from the alleged, but controverted, beatings, he was held for four or five days after his arrest before being taken before a magistrate for a preliminary hearing, and during that period was subjected to the questioning previously stated. For support of his position he relies upon decisions of the Supreme Court of the United States, which we therefore proceed to examine.

In *Ziang Sung Wan v. United States*, 266 U. S. 1, the accused, a very sick man, was subjected to persistent, lengthy cross-examination day and night by detectives. For ten hours he was led continuously from floor to floor of the building where the murder had occurred. On one occasion the questioning continued from 7 o'clock in the evening until 5 o'clock in the morning during which time he was not allowed to sleep. A confession obtained from him after twelve days of such methods was held inadmissible in evidence.

In *Brown v. Mississippi*, 297 U. S. 278, the accused was seized by a mob, hung by a rope to the limb of a tree, whipped with a leather strap, and threatened with even more severe treatment. It was held that a conviction which rested solely upon a confession thus obtained was void under the due process clause of the fourteenth amendment.

In *Chambers v. Florida*, 309 U. S. 227, the accused, under a haunting fear of mob violence, was subjected to persistent and repeated questioning almost continuously for a week and finally at a session beginning at 3.30 o'clock in the afternoon and lasting all night, being carried on while he was surrounded by the sheriff, the sheriff's deputies, a convict guard, and other officers and citizens. An admission obtained in the early morn-

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ing after the all-night vigil was held to be compulsory and the conviction obtained by its use was set aside.

In *White v. Texas*, 310 U. S. 530, the accused was kept in jail for six or seven days, and on several successive nights was taken by armed rangers into the woods where he was whipped and interrogated. He was questioned from about 11 o'clock one night to 3 or 3.30 o'clock in the morning. The confession then obtained was held to have been coerced and its use at the trial a violation of the due process clause of the fourteenth amendment.

In *Lisenba v. California*, 314 U. S. 219, the accused was questioned on two occasions at the district attorney's office,—once throughout the night and again the following night from early evening until 3 o'clock the next morning. After being detained in custody for eleven days, during which time he was not examined, he was again interrogated and, after a protracted inquisition, finally confessed at 3 o'clock in the morning. Although his detention was illegal under the state law it was held that the confession was voluntary and its use at the trial was proper.

In *Ward v. Texas*, 316 U. S. 547, the accused, after being arrested, was driven around during three days and nights from county to county, incarcerated in a place more than a hundred miles from his home, questioned continuously, and frightened with threats of mob violence. It was held that the use of the confession obtained under such circumstances was a denial of due process and voided the conviction.

In *McNabb v. United States*, 318 U. S. 332, the accused persons were detained in a room where there was nothing they could sit or lie down on except the floor. On two successive nights they were questioned

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on and off by at least six officers, beginning at 9 o'clock and continuing until 1 or 2 o'clock in the morning. It was held that the evidence thereby elicited should have been excluded. It was emphasized in the court's opinion, however, that the trial was in a federal, not a state, court, and therefore the question did not depend upon the application of the due process clause of the constitution but on the exercise of the court's supervisory authority over the administration of criminal justice in the federal courts and the rules of evidence formulated by it for application in federal criminal prosecutions.

In *Anderson v. United States*, 313 U. S. 350, the accused persons were detained in violation of the state statute and questioned intermittently all day over a period of six days in the hostile atmosphere of a small company-dominated mining town, the interrogations finally resulting in the obtaining of incriminating statements. These were held inadmissible in evidence, not, however, on the ground that they failed to meet the requirements of the due process clause, but, as in the *McNabb* case, because they violated the rules of evidence applied by federal courts in the trial of criminal cases. (See *Townsend v. Burke, Warden*, 334 U. S. 736, 738; *United States v. Mitchell*, 322 U. S. 65, 67, 68. In the latter case it was pointed out that the review by the United States Supreme Court of state convictions presents a very different situation from that of cases dealing with the admissibility of evidence in criminal cases in the federal courts: the court said that "in cases coming from the state courts in matters of this sort we are concerned solely with determining whether a confession is the result of torture, physical or psycho-

logical, and not the offspring of reasoned choice."; see also *Malinski v. New York*, 324 U. S. 401, 411).

In *Ashcraft v. Tennessee*, 322 U. S. 143; 327 U. S. 274, the accused was placed at a table in the jail with a powerful electric light over his head which blinded his eyes, and he was questioned by relays of detectives from a Saturday evening at 7 o'clock until the following Monday morning at approximately 7 o'clock, during which time he was not allowed to have any sleep or rest. The confession thereby obtained from him, as well as testimony narrating what took place during the inquisition, was held to be involuntary and inadmissible in evidence, and the conviction was reversed.

In *Lyons v. Oklahoma*, 322 U. S. 596, it was held that a confession was validly obtained and admissible in evidence although the accused had been interrogated on one occasion for two hours and again, after eleven days of further incarceration, from about 6.30 o'clock in the evening until between 2 and 4 o'clock the following morning, and later also that same evening, a large number of police, prosecuting and penitentiary officials being present during the interrogation and no counsel having been supplied to him.

In *Malinski v. New York*, 324 U. S. 401, the accused was stripped and kept naked in a hotel room from 11 o'clock in the morning until 6 o'clock in the evening and was then detained there for several more days during which time he was subjected to questioning; subsequently he was also questioned at a police station until 2 o'clock in the morning. The district attorney said at the trial that the police procedure had been quite proper in letting Malinski "sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get

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a shellacking." From this admission on the part of the prosecuting officer the court concluded that an oral confession obtained from the accused was the product of fear, was clearly coerced, and had therefore been improperly admitted in evidence.

In *Haley v. Ohio*, 332 U. S. 596, a 15-year-old boy was subjected to questioning by relays of police from shortly after midnight until about 5 o'clock the following morning when he confessed. He was then detained for three days during which period a lawyer retained by his mother tried to see him twice but was refused admission by the police, and his mother also was not allowed to see him. The court said that the boy's age, the hours when he was grilled, the duration of his quizzing, and the fact that requests to have counsel and his mother advise him were denied, all showed that the confession had been wrung from him by methods which could not be sanctioned and which violated the due process clause of the fourteenth amendment.

In *Townsend v. Burke, Warden*, 334 U. S. 736, the court reversed a conviction because the trial judge imposed sentence, in the absence of the prisoner's counsel, under an obvious mistake as to the prisoner's prior criminal record. The prisoner had been held incommunicado for a period of 40 hours between his arrest and his plea of guilty, but the court stated (p. 738) that "lawfulness of the detention is not a factor in determining admissibility of any confession * * *."

In *Watts v. Indiana*, 338 U. S. 49, the accused was interrogated at police headquarters by officers in relays from about 11.30 o'clock one night until between 2.30 and 3 o'clock the following morning, and the next afternoon from about 5.30 o'clock until 3 o'clock the following morning, and the questioning was con-

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tinued for four successive days; on the fifth day the prisoner made an incriminating statement at 3 o'clock in the morning after having been continuously questioned since 6 o'clock of the preceding afternoon. He had been kept the first two days in solitary confinement in a cell "aptly enough called 'the hole'." Apart from the several night sessions the police had intermittently interrogated him during the day, and also, on three days, had driven him around town hours at a time with a view to obtaining information from him respecting the crime. He had been denied proper opportunities for sleep and a decent allowance of food. The court held that the use of the confession thereby obtained was a violation of the due process clause and accordingly the conviction was reversed.

In *Turner v. Pennsylvania*, 338 U. S. 62, in which case the accused was one of the three persons implicated in the crime here involved, he was imprisoned between the time of his arrest and the magistrate's hearing during exactly the same period as Johnson. During that time he was examined on June 3 for three hours in the afternoon and again that night from 8 to 11 o'clock; on June 4 he was questioned for about four hours more; on June 5 he was interrogated for another four hours and on June 6 during day and night sessions totaling six hours; on June 7 the questioning began in the afternoon and continued for three hours, and later that day was resumed until finally, at about 11 o'clock that night, he admitted guilt, and at 9 o'clock the following morning his statement was reduced to writing. It was held that the confession was coerced and should not have been admitted in evidence.

In *Harris v. South Carolina*, 338 U. S. 68, the ac-

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cused, in the stifling heat of the cubicle in which the interrogation was conducted, was questioned mornings, afternoon and evenings for several days, on one occasion from 1.30 in the afternoon until past 1 o'clock the following morning with only an hour's interval at 5.30 o'clock. The sheriff, one of the interrogators, threatened the prisoner that he would arrest his mother for handling stolen property. It was held that a confession thus obtained should not have been used at the trial of the accused and his conviction was reversed.

The above cited cases are, if not the only, at least the more important ones decided by the United States Supreme Court, and from them it is possible to formulate certain principles. One is that a confession may have been given voluntarily although it was made to police officers while in custody and in answer to an examination conducted by them: *Ziang Sung Wan v. United States*, 266 U. S. 1, 14; *McNabb v. United States*, 318 U. S. 332, 346; *United States v. Mitchell*, 322 U. S. 65, 69. Another is that the effect of the mere denial of a prompt preliminary examination is a matter of state, not of federal, law and to refuse it does not constitute a violation of the fourteenth amendment although it is one of the facts to be considered on an allegation that a confession used at the trial was coerced: *Lyons v. Oklahoma*, 322 U. S. 596, 597, 598, footnote 2. And a third is that in cases where the evidence as to the methods employed to obtain a confession is conflicting,—that is to say, where there is a dispute as to whether beatings, whippings, or other acts of brutality actually occurred,—and that issue has been resolved by the trial court and jury, the appellate court will accept the determination of the triers

of fact if there was any substantial evidence to support their conclusion: *Lisenba v. California*, 314 U. S. 219, 238; *Ward v. Texas*, 316 U. S. 547, 552; *McNabb v. United States*, 318 U. S. 332, 339, footnote 5; *Lyons v. Oklahoma*, 322 U. S. 596, 602; *Haley v. Ohio*, 332 U. S. 596, 597, 598.

Measuring, then, the facts in the present case, so far as they are admitted by the Commonwealth, by the standards thus formulated by the Supreme Court, it should be readily apparent that none of the circumstances attending Johnson's confession, either singly or collectively, established that it was coercively obtained and that its admission in evidence at the trial therefore constituted a violation of the constitutional protection of due process of law. None of the lurid features which characterized the other cases marked any of the treatment accorded to Johnson; there was no violence, no threats or inducements of any kind, not even any resort to artifice to procure a confession. All that can be said is that (1) he was detained for a period of five days before being given a preliminary hearing; (2) no counsel was assigned to him nor communication established with friends or relatives; (3) he was subjected to questioning from time to time by groups of detectives. As to the detention prior to the magistrate's hearing, which, as previously stated, is admittedly a matter of state law, there is no statute in Pennsylvania which stipulates any precise time in which such a hearing must be held.[1] Furthermore,

[1] The Act of April 20, 1869, P. L. 1187, merely provides that, in Philadelphia, the preliminary hearing of the person arrested must be before the magistrate whose office is nearest to the place of arrest; this was designed to prevent a selection by the police of a "favorable" magistrate. It was not intended to mean, and has never been held to mean, that the person arrested must be taken before the magistrate immediately upon being apprehended. At common law no preliminary hearing whatever was required; it is an institution resting entirely on statute: 22 C. J. S. 484, §332(a).

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as was said in *Commonwealth v. Agoston*, 364 Pa. 464, 479, 72 A. 2d 575, 583: "Such a delay in granting a defendant a preliminary hearing cannot properly be adjudged a denial of due process. If the delay is due to the fact that the time between the arrest and the hearing is spent in attempting by improper means to force a confession from a prisoner, the wrong done the prisoner is not the delay in giving him a hearing, but the methods used to secure a confession * * *. A confession may be secured from a prisoner by unlawful methods one hour after his arrest and he may be given a hearing one hour after that, but the promptness of the hearing would not make his confession admissible. On the other hand a defendant may not be given a hearing for ten days after his arrest, yet during that period he might voluntarily confess his guilt without any questions whatever. The delay in giving him a hearing would not make his confession inadmissible."

As to the fact that defendant was not represented by counsel during the period of interrogation, it might well be that, if he had requested such representation and counsel had nevertheless been denied him, his rights would have been gravely infracted: *Commonwealth v. Spardute*, 278 Pa. 37, 46, 122 A. 161, 164; *Commonwealth v. Jones*, 341 Pa. 541, 548, 19 A. 2d 389, 393. Here, however, no such request was made, but only an inquiry as to whether counsel would be assigned to him at the trial. There is no provision in the law of Pennsylvania that a person arrested, even though on a charge of murder, must be supplied with counsel as soon as he is taken into custody. The Pennsylvania statutes provide for assignment of counsel *upon the trial* of a capital crime (Act of May 31, 1718, 1 Sm. L. 105, §IV) or to any person *under indictment*

for murder, to represent him at the trial (Act of March 22, 1907, P. L. 31).[2] The decisions of the United States Supreme Court are to the effect that counsel must be assigned for the defense of the accused in capital cases after indictment, or at least at the time of arraignment: *Powell v. Alabama*, 287 U. S. 45; *Tomkins v. Missouri*, 323 U. S. 485; *Hawk v. Olson, Warden*, 326 U. S. 271; *DeMeerleer v. Michigan*, 329 U. S. 663. Certainly due process has never been held to require that the State should provide a suspect with counsel from the very moment of his arrest: *Commonwealth v. Agoston*, 364 Pa. 464, 480, 72 A. 2d 575, 583. As for the fact that no relatives or friends visited or were in touch with Johnson during the period of his detention, he himself declared that he did not wish to see any one except his "girl friend."

All that we have left, therefore, in the present case as affording any support whatever to Johnson's contention is the questioning to which he was subjected. But, unlike any of the cases in the United States Supreme Court previously discussed, there was here no such "protracted, systematic and uncontrolled subjection of an accused to interrogation" (*Watts v. Indiana*, 338 U. S. 49, 55) as could possibly be regarded as physically or psychologically coercive in order to obtain an inculpatory statement. The questioning of Johnson was only at proper and normal hours—no late night or early morning sessions—and each time ranged in duration from only about 15 minutes to a maximum

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[2] In **Commonwealth v. Lenousky**, 206 Pa. 277, 55 A. 977, it was held that the testimony of a witness at a magistrate's hearing could not be used at the trial (the witness having meanwhile disappeared) because the defendant, not having been represented at the hearing by counsel, had not cross-examined the witness nor been informed of his right so to do. The case is far from holding that the accused must be assigned counsel at a preliminary hearing.

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of an hour and a half; whereas in the *Turner* case the examinations covered a total of 23 hours during the five days of his incarceration the total in Johnson's case during the same period was only 6 hours,—*an average of scarcely more than an hour a day.* While it is true that on some of the occasions several detectives participated in the interrogation, there is nothing to indicate—so far as the Commonwealth admits—that there was any hectoring, badgering or threatening of the accused, that he was ever denied rest or food, or that he was subjected in any manner to physical discomfort. Surely, therefore, it would be going further than any case thus far decided to hold that Johnson's confession was coercively obtained, neither is it thought that effective enforcement of the criminal law would be possible if a confession were to be held inadmissible when obtained by even such a limited amount of questioning of a suspect while being detained for a reasonable period prior to a preliminary hearing; see Wigmore on Evidence, 3rd ed. vol. III, p. 320, §851.

Johnson contends that the confessions of Turner and Lofton, who were associated with him in the commission of the crime, should not have been admitted in evidence. It is true, of course, that the declarations of a co-conspirator are evidence against the others only so long as the conspiracy continues, and if made afterwards they are not admissible: *Wagner v. Aulenbach*, 170 Pa. 495, 499, 32 A. 1087, 1088; *Commonwealth v. Petrillo*, 338 Pa. 65, 82, 83, 12 A. 2d 317, 326. But appellant misconceives the theory on which those confessions were introduced in the present instance. They were not admitted, as the trial judge correctly instructed the jury, as proof of the facts contained therein, but, under the familiar, well-established principle of

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the law of evidence, as statements made in Johnson's presence and hearing which, though incriminating in character and naturally calling for a denial, were not challenged or contradicted by him although he had an opportunity and was at liberty to speak. The fact of his failure to deny the accusations against him contained in the confessions of his confederates was admissible in evidence as an implied admission of the truth of the charges thus made, on the theory that ordinarily an innocent person will spontaneously repel false accusations against him, and that failure so to do is, therefore, some indication of guilt. It is quite immaterial, therefore, whether the statements made by Turner and Lofton were themselves freely made or otherwise, since the probative force of such an accusatory statement is derived, not from the credibility of the accuser, but from the silence of the accused in response to it: *Commonwealth v. Carelli*, 281 Pa. 602, 606, 127 A. 305, 306; *Commonwealth v. Vallone*, 347 Pa. 419, 421, 32 A. 2d 889, 890. Not only did Johnson not attempt to refute anything contained in the statements of Turner and Lofton, but he added his own signature thereto as a witness without, according to the Commonwealth's evidence, any compulsion whatever. This was an affirmative act which added to the effect of his tacit acquiescence: *Commonwealth v. Brooks*, 355 Pa. 551, 554, 50 A. 2d 325, 327.

Finally, appellant complains that his testimony before the magistrate at the preliminary hearing should not have been accepted in evidence. He claims that he was intimidated into making the same admissions there as were contained in his written confession, but this was emphatically denied by the Commonwealth's testimony; on the contrary, there is convincing evidence

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to the effect that he expressed a desire to go to the magistrate's hearing and to testify there, and that he was sworn at his own request after being warned by the district attorney that anything he said might be used against him in court and that he did not have to say anything if he did not want to. His testimony on the witness stand in the office of the magistrate was substantially in accord with the account he had given in his written confession of the details of the robbery and the extent and manner of his participation therein.

The crime of which appellant stands convicted was an extremely dastardly one, and, in our opinion, he was not denied due process of law nor was any of his other constitutional rights impaired; therefore he is not entitled to a new trial.

Judgment and sentence affirmed.

Dissenting opinion by Jones, J."

It is respectfully requested that the writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania be refused.

COLBERT C. McCLAIN,
Assistant District Attorney.
JOHN H. MAURER,
District Attorney,
Attorneys for Respondent.

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Appendix

Sworn testimony of defendants Jasper Johnson, Clarence Lofton and Aaron Turner before Magistrate Edward Williams, held in Central Police Court, City Hall, Philadelphia, Pa., on June 8th, 1946.

COMMONWEALTH'S EXHIBIT.

(The following is a copy of the transcript of testimony taken at the magistrate's hearing, referred to in the foregoing proceedings):

IN THE

MAGISTRATES' COURTS OF PHILADELPHIA.

CENTRAL POLICE COURT.

(City Hall.)

COMMONWEALTH
v.
CLARENCE LOFTON, JASPER JOHNSON, AARON TURNER.

Homicide: Robbery: Burglary: Conspiracy to Commit Felony.

Philadelphia, Pa., June 8, 1946.

Commonwealth's Exhibit—Lieutenant James Kelly—Direct

Before: HON. EDWARD WILLIAMS, Magistrate.

PRESENT:

D. BARLOW BURKE, Esq., A. D. A., for the Commonwealth.

LIEUTENANT JAMES KELLY, sworn:

BY MR. BURKE:

Q. Lieutenant Kelly, did you make the investigation in the case of these three men?

A. I did.

Q. Proceed, please.

A. On December 15, 1945, at 355 North 2nd Street, at the Ace Broom Factory, an assault took place at about 4:45 in the afternoon, and as a result of the assault two persons died, one known as Charles Simmons and the other known as Frank Enders. Enders was 62 years of age and Simmons was 52 years of age. As a result of the investigation at that time, it was determined that in addition to the homicide, there was also a robbery involved, the amount of money taken we were unable to determine. So, as a result of a further investigation, these three defendants were arrested, Clarence Lofton, the No. 1 man, Jasper Johnson, the No. 2 man, and Aaron Turner, the No. 3 man. These men have made statements to the police, setting forth the part each one took in this particular case.

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Q. Does each one admit in his signed statement that he was involved in the homicide?
A. They do, sir.
Q. Are the statements here, Lieutenant?
A. No, sir.
Q. Any further testimony from an officer?
A. No, sir.

MR. BURKE: Do any of you men want to say anything this morning? I want to warn you in advance that anything you say may be used against you in Court, and that you don't have to say anything if you don't want to. I understand, however, that you have made statements to the officers and signed those statements. Jasper Johnson, you have made a signed statement to the officers?

JASPER JOHNSON: Yes, sir.

MR. BURKE: Do you want to say anything this morning?

JASPER JOHNSON: Yes, sir.

JASPER JOHNSON, Co-Defendant, sworn.

BY MR. BURKE:

Q. Now, what's your name?
A. Jasper Johnson.

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Commonwealth's Exhibit—Jasper Johnson
—Direct

Q. Are you also known as "James Johnson," "Fats" and "Playboy"?

A. Yes, sir.

Q. What is your residence?

A. 620 South 13th Street.

Q. You have heard the testimony of Lieutenant Kelly before his Honor this morning?

A. Yes, sir.

Q. Do you want to add anything to that?

A. Yes, sir.

Q. Were you connected with the activities that Lieutenant Kelly testified to?

A. Yes, sir.

Q. Were you involved in the homicide of Charles Simmons and Frank Enders?

A. Yes, sir.

Q. What part did you play in that?

A. December 15th, at 12th and Bainbridge, Aaron Turner and Clarence Lofton came to 12th and Bainbridge and got me. "Treetop" said to me ——

Q. Who is "Treetop"?

A. Aaron Turner—said to me: "Come on, Fats, and go with me. I'm going to get some money." I said to Treetop, I said: "I don't mind going, but I don't want no trouble." He said: "There were no trouble. Come on." We goes to 12th and South from 12th and Bainbridge, and stopped between 5th and 6th at a hot-dog stand and gets a couple of sandwiches apiece. We leave there. We goes to 2nd Street. We goes to start, and I had been drinking and was beginning to get sick. So, Clarence said: "Treetop, if its much further, we'll catch a trolley." Treetop said: "We don't have much more to go, so we'll walk on down." So, we walked to 2nd and Callowhill. Treetop says to Clarence:

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"You wait on the highway." Treetop and I goes in the first door together. We goes in the first door together and gets on the inside. Treetop had a package in his pocket, and a pipe wrapped up in newspaper.

Q. A package? What kind of a package?

A. A piece of sash-weight wrapped up in paper, about eight inches long and about that round (indicating about one inch). We gets to the first door. Treetop gets ahead.

Q. Did you follow him in?

A. I follow him in. He gets one of the guys. The smallest guy he slugs. I don't know how many times he slugged him.

Q. Did you see that?

A. Yes, sir. After Treetop slugs him, I gets in his pocket and gets his wallet. I was trying to get it out of his hip pocket. I slings the wallet in the building, where I don't know. So, when I looks around, Treetop and this other guy is tussling.

Q. You saw him tussling with another man?

A. Another white man. So, after I got through mine, I looks around and said: "Let's go." So, I leave out running. Treetop follows.

Q. You mean you left the place?

A. I left running. Treetop follows: After Clarence sees us running, Clarence follows us.

Q. What was Lofton doing?

A. He was the watchout man. He never entered the building. So, we goes on down the street. We get near 8th and Callowhill, somewhere close by, I look at the money, I don't know exactly how much, it looks like $175.00.

Q. You testified before that you threw the wallet away?

A. I takes the money out before I threw it away. So, I takes $50.00. I hand the other to Treetop. Treetop gave

Clarence some money. I don't know how much. So, after Treetop gives Clarence the money ——

Q. Did you see him give Clarence the money?

A. I saw him, but I don't know how much. I says to Treetop: "How much—what did you get off the other fellow?" He says: "Nothing." We goes to 8th and Callowhill and gets a couple of large drinks. Treetop goes in the bathroom and comes out. We catch an 8th Street trolley and go back downtown to 12th and South. We get a couple of drinks in there and goes from 12th and South to 12th and Bainbridge, where I met him, and get a couple more drinks and splits up there.

Q. Up until then you had been together?

A. That's right. The next what was said, Treetop said to me and Clarence: "Anybody gets arrested, you don't know me and I don't know you."

Q. Who said that?

A. Aaron Turner—"Treetop."

Q. Then what happened?

A. That's all. We split up.

Q. How about this second man in the room?

A. Treetop had him.

Q. What was he doing to him?

A. When I looked around, him and Treetop was tussling.

Q. Did you see Treetop slug him?

A. I saw some blood.

Q. Did Treetop still have this object in his hand?

A. I'm not sure whether he had that sash-weight at that time or not.

Q. Did you see Treetop slug him, the second man?

A. That's right.

Q. Was the first man on the floor at the time?

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A. Yes, sir, he was on the floor, and I was trying to get in his pocket.

Q. Was he lying on the floor when you three left?

A. Yes, sir.

Q. Anything else you can add?

A. No, sir.

CLARENCE LOFTON, Co-Defendant, sworn.

BY MR. BURKE:

Q. You've been told that everything you say may be used against you, and that you don't have to speak unless you want to. However, I'm going to give you the opportunity of speaking if you want to. You have just heard the story of Jasper Johnson. Anything you can add to that?

A. No, sir, I haven't anything to add to it.

Q. Were you there when these events happened?

A. Yes, sir. He just about covered everything. I was there, and was standing outside watching.

Q. You corroborate what he has said?

A. That's right.

Commonwealth's Exhibit—Aaron Turner
—Direct

AARON TURNER, Co-Defendant, sworn.

BY MR. BURKE:

Q. Do you want to say anything to his Honor?
A. No, sir.
Q. Can you add anything?
A. No, sir.
Q. You don't want to add anything. Do you agree with the testimony that these two men have given in Court?
A. Yes, sir.
Q. You corroborate their testimony?
A. Yes, sir.
Q. You say that it's true?
A. Yes, sir.
Q. You're not denying anything that they said?
A. No, sir.
Q. How much money did you get in this?
A. I don't know.
Q. About how much?
A. I would say $175.00.
Q. Did you divide up with the others? Was that $175.00 that which you, yourself, got out of the thing?
A. Yes, sir.
Q. Was that in addition to the $50.00 that one got and the $175.00 the other got?
A. No, sir.
Q. That's your share?
A. Yes, sir.
Q. You got $175.00 yourself?
A. Yes, sir.

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CLARENCE LOFTON (recalled).

BY MR. BURKE:

Q. Will you tell his Honor how much you got out of this?
A. About $87.00 is what he gave me.
Q. That was given to you by "Treetop" Turner?
A. That's right.

JASPER JOHNSON (recalled).

BY MR. BURKE:

Q. How much did you get?
A. $50.00.
Q. How much was in the wallet?
A. I estimated about $175.00. I wasn't sure.
Q. Whom did you get that from?
A. The first white fellow in the building he slugged. I passed it to Treetop.

MR. BURKE: Your Honor, I think a prima facie case of homicide, burglary and robbery has been established against these three defendants, and I'm going to ask that you hold all three without bail for the action of the Grand Jury.

LIEUTENANT KELLY: I might add that there has been a Coroner's inquest in this matter, at which time the

finding was that the deaths resulted at the hands of a person or persons unknown.

MR. BURKE: I think, your Honor, that these members of the Detective Division are to be commended for a very fine piece of detective work in cleaning up this mysterious murder. They ought to be commended for it, and I would like to go on record as saying it.

THE COURT: I think the same way. Without bail for Court.

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the hearing of the above cause, and that this a correct transcript of the same.

(Sgd.) DAVID F. HOULIHAN, JR.,
Stenographer.